FILE COPY

FILED

FEB 28 1927

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

No. 36.

October Term, 1926.

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS.

Brief of Ira Jewell Williams, John E. Stone and P. B. Perkins, as *Amici Curiae*.

JOHN E. STONE,
P. B. PERKINS,
IRA JEWELL WILLIAMS,
Amici Curiae.

INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States.

October Term, 1926. No. 362.

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF IRA JEWELL WILLIAMS, JOHN H. STONE AND F. R. FORAKER, AS AMICI CURIÆ.

STATEMENT OF QUESTION INVOLVED.

Where goods are manufactured and furnished under mandatory orders issued under Congressional power making such orders obligatory and giving precedence thereto over commercial orders, is there a "taking" giving rise to true just compensation, *i. e.*, market value and just compensation for delay in payment?

I. A PROMISE NOT TO DISOBEY A COMMAND OF GOVERNMENT DOES NOT CONSTITUTE A CONTRACT.

Congress authorized "obligatory" orders—to be given preference over all commercial transactions. Such obligatory orders were issued in war time. The citizen signed saying, in effect, "I will obey." All parties believed that the orders were obligatory and requisitions. The facts found showed a clear right to just compensation for the balance of the value of the goods furnished. The Government was unable to suggest any defense.

The Court below, however, *sua sponte*, found that the orders were not obligatory; that they did not constitute requisitions; that the status was not of obedience to law and command but consensual, and, hence, that although claimant saved the price and reserved its rights to just compensation, that meant merely a contract to pay just compensation as of the time of the taking and claimant could not recover just compensation for the long delay in payment.

While the obligatory orders were placed "by the direction of the President" under certain statutes of 1917 authorizing the placing of obligatory orders and the payment of just compensation for goods obtained thereby, the Navy did not proceed *sub modo*. As the records of this court

> United States v. New River Collieries Company, 262 U. S. 341 (1922),

and the Court of Claims

> Atlantic Refining Co. v. United States, 59 C. Cls. 108 (1923),

show, the Navy instead of attempting to ascertain the market value of goods obligatorily ordered, adopted its own formula of "cost plus a reasonable profit to the least economical producer whose product was necessary to supply the demand."

> Blake v. United States, 275 Fed. 861, 867 (1921).

Such nuances were, of course, irregular because in disregard of the exhortation of the acts that the President fix just compensation and pay 75 per cent. thereof. But the obligatory orders were issued by virtue of an express authorization to issue obligatory orders, and the failure of the executive department to observe details merely directory, so far as regards the right of the citizen to object, did not deprive the obligatory order of its exigent character. It was a command in war time from the supreme power in the State and neither the citizen to whom it was directed nor the Government after its execution could disavow its mandatory character or justify disobedience thereto on the ground that it asked for an acceptance and hence was the offer of a contract, or on the ground that it offered a tentative price to be paid in full instead of fixing just compensation and paying 75 per cent. thereof. The obligatory order had the essential elements: that it was issued by virtue of an express congressional action, that it purported to be an obligatory order so issued, and that it carried upon its face the irrefutable evidence of its mandatory nature.

The Court of Claims held that the obligatory order could not be anything except an offer to contract because it contemplated an acceptance. This is sticking in the bark since an acceptance of a command merely means the signifying of an intent to obey. The goods were goods to be manufactured and the Navy naturally wished to be assured that the citizen instead of

being disloyal and intransigeant would proceed with all speed laying aside all commercial business to obey the command of the commander-in-chief.

A request from a superior is a command:

> State *ex rel.* Freeman v. Scheve, 93 N. W. 169, 170 (1902); 65 Neb. 853 (1902); 59 L. R. A., 927 (1902).

II. PRIVATE PROPERTY MAY BE TAKEN FOR PUBLIC USE WITHOUT ACTUAL PHYSICAL FORCE.

Is the test physical seizure or obligatory *requirement?* Goods to be manufactured cannot be physically seized any more than a contract can be physically seized:

> Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924).

All ships on the ways were requisitioned by a notice to the shipbuilder that the contract had been requisitioned.

All ships *in esse* over 2500 tons burden were requisitioned by proclamation of the President. Was not a ship at sea which got the news by radio under a real obligation to obey?

Coal to be mined has been taken under obligatory orders and a judgment, including interest, affirmed by this Court:

> United States v. New River Collieries Company, 262 U. S. 341 (1922).

As to the interest element see

> New River Collieries Co. v. United States, 300 Fed. 333 (1924), Bodine, *D. J.*

Petroleum products (to be manufactured) in like manner were required by obligatory order and the Court below gave judgment with interest:

Atlantic Refining Company v. United States, 59 C. Cls. 108 (1923).

How better define "requisition" than an obligatory requirement? Did the Government "require" these goods to be furnished? What could Congress have intended when it authorized an obligatory order except to give power to the executive to *require* citizens to obey?

Congress had power to say that the citizen must. Congress had power to authorize the executive to say that the citizen must. Congress acted. The executive acted. Hence, the law of the case.

All the Acts in effect say "must": It is the law that we *must* furnish war material on the demand of the Government. Whether technically a requisition, it is a legal requirement and rule of law: The law said we must when the Secretary said we must, and the Secretary said we must and we did because we knew and believed we must and that if we did not, we would be criminals and/or bereft of our plant.

The Navy required the goods to be delivered. There was power so to require. The Navy asserted that power. An obligatory order is a command. A command in war time to comply with the requirements of the Government is a requisition. The requirements of the Navy intervened and were interposed as against the ordinary conduct of the citizen's business. The requirements of the Navy were complied with because such requirements were obligatory. What was all this but a requisition? How else requisition goods to be manufactured? Must the government turn manufacturer? And if the manufacturer makes and delivers

under compulsion, is not the governmental function which the Government is carrying on under war powers granted in war time the act of requisition?

> To requisition is "To make a requisition or *authoritative demand for*, especially for military purposes."
>
> A requisition is the "Act of requiring or *demanding as of right;* a *demand* or *application* made by *authority.*"
>
> Webster's New International Dictionary.

> A requisition is the "Act of demanding a thing to be done by virtue of some right."
>
> Bouvier's Law Dictionary, 3d Ed., Vol. 3, p. 2904.

An obligatory order (*i. e.*, a command) and a conditional offer are self-contradictory terms.

It is a contradiction in terms to say that when in time of war the commander-in-chief commands the citizen by an obligatory order to deliver materials which he has on hand or can produce, whether such command is backed by the sanction of arrest and prosecution for a felony or whether it is backed by the sanction of a taking over of the citizen's plant, obedience to the command results in a contract.

The contrary contention leads to an absurd and untenable conclusion: There can be no taking short of actual physical taking; there was no actual physical taking here; hence, there was no taking; hence, it must be a contract. The case must be pigeonholed under "Contract" or "Commandeering." It cannot go under "Commandeering" because delivery was made without actual violence. Hence, it must go under "Contract"!

III. THE NATIONAL DEFENSE ACT (3 JUNE, 1916) MADE THESE ORDERS OBLIGATORY AND NON-COMPLIANCE A FELONY SUBJECT TO FINE AND IMPRISONMENT.

Congress, anticipating war, had on June 3, 1916, empowered "the President in time of war . . . through the head of any Department of the Government" to place an order, compliance with which "shall be obligatory" the compensation to be "just," and a violation to be a felony punished by three years' imprisonment and $50,000 fine.

That was the law and the citizen was bound to know it.

The law contemplated that the President act through "the head of any Department." The obligatory order was placed "under the direction of the President of the United States" and "by direction of the Secretary of the Navy."

The Secretary of the Navy did not specify that law. But his failure to mention the law did not wipe it from the statute books. The authority was there and the head of the department was affecting to act "under the direction of the President of the United States."

The Secretary had no power in peace time to waive the applicable provisions of any criminal statute. Such waiver could not be by silence. In war time the whole power of the law must be back of every action of department heads looking to the conduct of the war.

The program and procedure of the Navy came directly within the express terms of the National Defense Act. Sound public policy and common-sense alike dictate that the citizen may not deny, or the Government officials disclaim, the exigency and sanction of express statutes clearly applicable for the strengthen-

ing of the hands of the Government and the stimulating of cooperative conduct by citizens in war time.

There could have been no defense to the criminal provisions of the National Defense Act.

The formal Navy orders state they were "placed" pursuant to the provisions of the Acts of Congress of March 4, 1917, and June 15, 1917. These acts authorize and empower the President to "place an order" compliance with which shall be "obligatory."

IV. CONGRESS MUST HAVE INTENDED THAT TRUE JUST COMPENSATION BE PAID ON "OBLIGATORY" ORDERS.

Having yielded submission and obedience, what does the law of Congress say as to what we are to get for our property? The National Defense Act said that "compensation" shall be fair and "just." The Acts of 1917 say that we are entitled to "just compensation." What did Congress mean by just compensation? Congress used terms of art, a phrase from the Constitution—a pertinent and apposite phrase. The Congress was dealing with the compensation of citizens for material delivered to the Government in war time under Governmental coercion or compulsion. The Congress said "just compensation." Congress must have intended true just compensation, namely, just compensation as of the time when payment should have been but was not paid. So construed, the mandate is plain to pay in full, notwithstanding Section 177.

The case does not arise out of any implied contract, but is based upon the express terms of Section 145 of the Judicial Code: "All claims . . . founded upon the Constitution of the United States or any law of Congress . . ." and the Act of June 15, 1917: "to re-

cover . . . just compensation . . . in the manner provided for by . . . Section 145 of the Judicial Code."

The claim here is founded upon the Constitution of the United States and a law of Congress in pursuance thereof. Congress has written into its laws the words of the Constitution. Those words had and have a well-known and clearly understood meaning. When Congress adopted those words Congress used them with that meaning. Market price being the measure of just compensation, the citizen could have obtained cash in the market. The use of money has a well-known value. By the act of compulsorily requiring the citizen to deliver his goods the citizen is deprived of the use of the money and unless he is compensated immediately or is compensated for the loss of the use of the money, he does not receive the true measure of "just compensation."

The Congress intended to write into its statutes the substance and full measure of the right granted by the Fifth Amendment. The Government has no power to take except upon payment of just compensation. The Government is under a duty to pay just compensation in full. The Government has no right to pay less than just compensation.

The mandate is laid upon every department of the Government. The case is one of the rare ones in which it can be demonstrated mathematically that only one decision is possible without violating a plain right.

That plain right is, to be paid in full as of the date of taking. Any conclusion by which the citizen is forced to give up his property for public use and is obliged to receive less than just compensation involves a palpable wrong. To say that the citizen who is obliged to turn over his goods to Government and to whom Congress gives the right to sue in the District Court is entitled to true just compensation, but that the citizen who sues in the Court of Claims is not,

would make a laughing stock of the law. *Such an intent would be unconstitutional as in violation of the Fifth Amendment; and courts will construe statutes, if that is in any way possible, in such a sense that they will be constitutional rather than unconstitutional. The theory that Congress intended those suing in the District Court to obtain just compensation, but not those suing in the Court of Claims, must bear the heavy burden of every reasonable presumption against it;* for, as was said in *Linder v. U. S.*, 268 U. S. 5, 17, 18 (1925), "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Cf. Lewellyn v. Frick*, 268 U. S. 238, 251 (1925).

The words of Section 177 of the Judicial Code have a proper legal meaning limited to interest *qua* interest. Compensation for detention may be measured by interest, but such compensation is in fact not the same as interest.

> *United States v. Rogers*, 255 U. S. 163, 169 (1921);
> *Seaboard Air Line v. U. S.*, 261 U. S., 299, 306 (1923).

It is a fiction to say that the claim in such cases is based upon an implied contract. A fiction should never be permitted to work injustice: 25 C. J. 1086; *U. S. v. 1960 Bags of Coffee*, 8 Cranch (U. S.), 398, 415 (1814).

The fact is that no contractual relation exists between the Government and the citizen when the government says "Willy-nilly, you must hand over your property for government use."

The manner in which and the court in which the citizen's right to enforce the government's obligation

to pay just compensation may be asserted are matters *purely procedural.* It borders on the fantastic to suggest that a question of procedure as to whether one court of the United States or another court of the United States has jurisdiction can affect the substance of the right of just compensation. *In one court of the United States the citizen is entitled to the full measure of true just compensation; in another court of the United States he is not entitled to the full measure of just compensation!*

When payment is delayed the citizen can be given just compensation in no other way than by an allowance for the delay in payment.

Under the only true definition of just compensation, interest or its equivalent must be included as a part of just compensation itself. And there is no room to argue that Congress did not so intend.

The claim in the case at bar is for just compensation for material and just compensation for the delay in payment. At the dates of the taking claimant should have been paid just compensation, and the loss to which claimant has been subjected by the delay must be considered and allowed for at the rate of 6 per cent. per annum.

Section 177 of the Judicial Code does not forbid the payment of interest in this case. Congress has said that we are entitled to receive any amount sufficient to make up "just compensation." This court has said that that means "so much in addition" as "will produce the full equivalent of the value paid contemporaneously with the taking." Whether the "so much in addition" be called interest or not makes no difference. It is a part of just compensation. Section 177 is inapplicable, or, as to cases coming within their purview, is amended by the Acts of 1917.

CONCLUSION.

The Court below lost its way in a maze of inapplicable technicalities and ignored the larger implications. Had Congress the power to authorize the placing of an "obligatory" order? If Congress acted with power, are such orders really "obligatory," or was the assertion that they were obligatory a false pretense or an idle and impotent gesture? If the orders were obligatory, is it not circular and absurd reasoning to say that they could not be obligatory because they might be disobeyed? And then upon this unsound major premise to erect a theory of contract in the teeth of the facts and contrary to the actual intent?

It is important to save the Government's money. It is important that the Treasury should be protected from unjust claims. It is at least as important that the citizen should be protected in the full measure of his constitutional rights. It is most important that the full exercise of the war power should be unhampered by any ruling limiting useful agencies in making war. The power to place an obligatory order is a useful power of obvious expediency. To say that such an order was a request or an offer, not a command, is to strike at the heart of the whole system. Even in war time business men are charged with certain responsibilities to their dependents, and corporate managements are charged with responsibilities to their stockholders. If obligatory orders are obligatory and constitute a taking of property, such orders will be obeyed; otherwise, they will not. And the Government may be confronted by the alternative in war time of trying to socialize or communize or nationalize all the intricate business machinery of the country. Business men are not always successful in running their own businesses; the Government seldom is.

In many cases in which the citizens have responded to obligatory orders in the belief shared by all Gov-

ernment officials including the Department of Justice, that the orders were obligatory, the claimants are threatened with the loss of one-third or more of true just compensation, for, in some cases, the interest period will be eight or ten years, the interest equalling one-half or more of the principal of the claim. The business world and the legal profession will not soon forget the experiences of the last decade.

IRA JEWELL WILLIAMS,
JOHN H. STONE,
F. R. FORAKER,
Amici Curiæ.

IRA JEWELL WILLIAMS, JR.,
CHARLES L. GUERIN,
Of Counsel.